



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 49 OF 2006

JANET TOWETT.....PLAINTIFF/RESPONDENT

VERSUS

JOHN KOECH.....DEFENDANT/APPLICANT

RULING

What is before me is an application dated 29th May 2017 brought pursuant to Order 10 rule 11, Order 22 rule 22 and Order 51 rule 1, 15 and 16 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The main prayers sought are first that there be a stay of execution of the judgment and decree issued herein pending the hearing and determination of the application herein. Secondly, that the court be pleased to set aside the ex-parte judgment and decree issued herein. The third prayer is that the applicant be granted 14 days to file his defence.

The application is based on the grounds sated on the Notice of Motion and is supported by the defendant/applicants affidavit sworn on the 29th May 2017. The main reason given by the applicant for failure to enter appearance and file a defence is that he was never served with Summons to Enter Appearance and he only came to learn of the existence of the suit when he was served with an eviction notice pursuant to the ex-parte judgment that had been entered against him. He also depones that he has a good defence a draft of which is annexed to his affidavit.

On the other hand, the plaintiff/respondent has opposed the application through her lengthy replying affidavit filed in court on 9th June 2017. She depones that the applicant was not only served with Summons to enter Appearance but with several hearing notices thereafter copies of which have been attached to her affidavit. She further depones that the applicant has no proprietary interest over the plaintiff's land parcel number KERICHO/KABIANGA/1553 and is therefore not entitled to the orders sought.

The parties opted to dispose of the application by way of written submissions and the same were duly filed. There are four key issues for determination:

1. Whether the defendant/applicant was properly served with Summons to Enter Appearance
2. Whether the judgment is regular
3. Whether the defendant/applicant's defence raises triable issues
4. Whether the defendant/applicant is entitled to the orders sought.

On the first issue regarding service of Summons to Enter Appearance, the defendant/ applicant depones that he was not served. He has challenged the affidavit of service prepared by the process server who allegedly served him with summons as well as the various hearing and mention notices. With regard to service of summons he states that the Process Server does not indicate which particular office he visited as his place of work has many different departments. The process server also does not state the name of the person who identified the applicant to him.

Order 5 rule 15 (1) of the Civil Procedure Rules provides as follows:

The serving officer in all cases in which Summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons were served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons...

Counsel for the applicant has referred me to the case of **National Bank of Kenya V Peter Oloo Aringo 2004 eKLR** where Warsame J (as

he then was) faced with a similar situation stated as follows:

“The legal requirement is that a process server should specify the time and date when he serves the document as well as the person who points out the alleged residence of the person to be served in compliance with Order 5 of the Civil Procedure Rules. Failure to comply with the provisions set out in Order 5 of the Civil Procedure Rules make any such service defective. If there is no proper service, there is no regular judgment”

In the instant case, Geoffrey Sang, the process server mentions in his affidavit of service dated 18th July 2006 that he met a watchman who directed him to the defendant’s office without naming the said watchman. This falls short of the requirements of Order 5 Rule 15 (1) of the Civil Procedure Rules.

The second issue as to whether the judgment was regular is answered by the finding in the **Oloo Aringo** case cited above which I find useful. This position is reinforced by the case of **Frigonken Limited V Value Pak Food Ltd** which was cited in the case of **James Kanyita Nderitu & Another V Marios Philota Ghikas and Another** (2013) eKLR where it was held that:

“It is common knowledge that if there is no proper service or any service of Summons to Enter Appearance to the suit, the resulting default judgment is an irregular one which must be set aside ex debito justitiae”

The third issue that the court must determine is whether the defendant/applicant has a defence that raises triable issues. In arriving at a determination on this issue I rely on the case of **Tree Shed Motor Limited V D T Dobie Civil Appeal No 38 of 1998** cited in the case of **James Wanyoike & 2 Others V CMC Motors Group Limited & 4 Others. (2014) eKLR** where the court held:

“Even if service of summons is valid, the judgment will be set aside if the defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff’s claim. Where the defendant shows a reasonable defence on the merits, the court could set aside the judgment”

Furthermore in the case of **Patel V East Africa Cargo Handling Services Ltd (1974) EA 75** Duffus P stated as follows:

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean in my view, a defence that must succeed, it means as SHERIDAN J put it “a triable issue”, that is, an issue which raises a prima facie defence and which should go to trial for adjudication”

I have looked at the Plaintiff and the draft defence attached to the applicant’s supporting affidavit. The Plaintiff states that she is the registered owner of land parcel number KERICHO KABIANGA/1553 and that the applicant has unlawfully trespassed onto the suit land. On the other hand, the applicant in his draft defence challenges the respondent’s title to the suit land and alleges that the respondent fraudulently had the said title registered in her name. I am therefore persuaded that the defence raises triable issues that should be considered at a full hearing.

In determining the last issue as to whether the defendant is entitled to the orders sought I must consider that justice cuts both ways and the interests of the plaintiff who has obtained a judgment in her favour must also be taken into account. It is not lost to me that the defendant only moved the court to set aside the judgment when an eviction order was served on him. I have also taken into account the fact that this is an old case dating back to 2006. In the circumstances I set aside the ex parte judgment and decree issued herein and direct that the applicant pays the plaintiff a sum of Kshs. 15,000 as thrown away costs. The draft defence shall be deemed as filed and served upon payment of the requisite court fees. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 16TH DAY OF OCTOBER 2017

J.M ONYANGO

JUDGE

In the presence of:

Miss Ngeno for the Defendant/Applicant

Mr. Terer for the Plaintiff/Respondent

Court Assistant: Rotich